

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs October 27, 2009

**LIONEL R. LINDSEY v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Sullivan County**  
**No. C53213     R. Jerry Beck, Judge**

---

**No. E2008-02789-CCA-R3-PC - Filed December 30, 2009**

---

The petitioner, Lionel R. Lindsey, appeals from the Sullivan County Criminal Court's denial of post-conviction relief. He argues on appeal that his trial counsel was ineffective by failing to properly investigate his defense and by failing to object to certain inadmissible evidence. Discerning no error, we affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JOHN EVERETT WILLIAMS, J., joined.

Keith A. Hopson, Kingsport, Tennessee, for the appellant, Lionel R. Lindsey.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany Faughn, Assistant Attorney General; H. Greeley Welles, Jr., District Attorney General; and Joseph Eugene Perrin, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

On January 22, 2004, a Sullivan County Criminal Court jury convicted the defendant of two counts of selling .5 grams or more of cocaine within 1,000 feet of a secondary school. *See* T.C.A. §§ 39-17-417(1)(a), -432(b) (1997). The trial court sentenced the defendant as a Range II offender to 32 years, six months' incarceration for each conviction and ordered the sentences to be served concurrently. This court affirmed the judgments, and our supreme court denied the petitioner's application for permission to appeal on August 21, 2006. *State v. Lindsey*, 208 S.W.3d 432 (Tenn. Crim. App. 2006), *perm. app. denied* (Tenn. Aug. 21, 2006). On February 12, 2007, the petitioner filed a pro se petition for post-conviction relief. The post-conviction court appointed counsel, and both the petitioner and counsel filed several amended petitions.

The petition as amended alleged, among other things, that trial counsel was ineffective by failing to properly investigate whether the property alleged to be a secondary school actually functioned as a school at the time of the offense; by failing to investigate whether the

alleged drug deals occurred within 1,000 feet of the school; by failing to object to prejudicial hearsay; by failing to inform the petitioner of the unavailability of a key State witness; and by failing to investigate a co-defendant's plea agreement to determine whether he would testify to benefit the petitioner.

At the post-conviction hearing, the petitioner testified that he was convicted of selling cocaine within 1,000 feet of the New Horizon Alternative School ("NHAS") in Kingsport, Tennessee. The offenses occurred on October 29 and 31, 2001. The petitioner testified that he spoke with his trial counsel no more than three times prior to his January 2003 trial and that each of these visits lasted less than 30 minutes. He said that he told counsel that the building currently housing NHAS was not used as a school at that time but that counsel failed to investigate this claim prior to trial. The petitioner testified that he only received information from counsel during his appeal in 2005 or 2006 that NHAS "was labeled a school sometime in 2002." Post-conviction counsel moved into evidence an April 11, 2002 letter from the Kingsport City Schools superintendent to the district attorney general recognizing that the building located at 205 East Sevier Avenue in Kingsport housed NHAS. During the petitioner's testimony, post-conviction counsel admitted that he had no evidence that NHAS did not operate as a school at the time that the petitioner committed the offenses.

The petitioner testified that he and counsel discussed whether the place in which he allegedly sold the drugs was within 1,000 feet of a school. He testified that counsel told him that he drove his vehicle from the school to the point of the drug transaction. He testified that counsel did not further investigate whether the offense occurred within 1,000 feet of a school. The State responded that during the trial the Geographical Information System ("GIS") Manager for Kingsport testified that the drug transaction occurred within 480 feet of the school.

The petitioner also testified that counsel did not inform him that Ginger Wilson would be unavailable for trial. Ginger Wilson, the confidential informant whose purchases of drugs from the petitioner led to his arrest and convictions, was injured in an automobile accident and was in a coma during the trial. The petitioner maintained that he only learned of Ms. Wilson's unavailability the day before trial through a discussion with his co-defendant, Robert Sullivan. He stated that several hearsay statements from Ms. Wilson were admitted into evidence without objection from trial counsel. Post-conviction counsel pointed to four instances when Officer Sherry Ramsey testified to statements by Ms. Wilson:

- (1) Ginger Wilson stated that Mr. Sullivan was present on October 29, 2001;
- (2) Ginger Wilson told her that Darius McNeill was the individual calling on the mobile telephone;
- (3) Ginger Wilson identified Mr. Sullivan to Officer Ramsey; and
- (4) Ginger Wilson said she had met with the petitioner and that he had given her his telephone number.

The petitioner also noted that the district attorney general, in his closing arguments, referred to Ms. Wilson's identification of the petitioner as the perpetrator and that trial counsel failed to object.

On cross-examination, the petitioner admitted to a federal conviction of distribution of cocaine in 1994; a cocaine trafficking conviction in Pennsylvania in 2000; and an unauthorized use of a vehicle conviction in Pennsylvania in 2000. He also acknowledged that trial counsel was his third attorney in the case. He admitted that he wrote a letter praising his trial counsel for representing him, but he explained that was only “[b]ecause [the petitioner] was ignorant to the law.” The petitioner stated that he did not possess records from the county jail to prove the number of occasions on which counsel met with the petitioner. He admitted that counsel spoke with him “at great length” about potential alibi witnesses, but he maintained that counsel mainly talked about “taking a deal.”

On redirect examination, the petitioner testified that Mr. Sullivan, his co-defendant, pleaded guilty to selling cocaine prior to the petitioner’s trial. The petitioner stated that he discussed his co-defendant’s plea with counsel but that counsel never investigated the circumstances of Mr. Sullivan’s plea agreement or whether Mr. Sullivan would testify to the petitioner’s benefit.

The State called trial counsel, who testified that he was originally licensed to practice law in California in the early 1990s and that he moved to Tennessee and obtained his license here in 1996. He testified that he had worked at the same law firm since 1997 and that 40 percent of his practice involved criminal law. He testified that he had participated in several criminal and civil jury trials.

Counsel testified that he met to discuss the case with the petitioner between seven and 10 times. He stated that the petitioner’s prior counsel helped him sort through the indictment and evidence upon his appointment to the petitioner’s case. Counsel testified that he told the defendant that, in light of video evidence showing the transaction, he believed that the State would easily prove the petitioner’s guilt. He testified that the petitioner consistently asserted his innocence.

Counsel testified that the petitioner never told him that Mr. Sullivan would testify for him and that the petitioner never informed him about Mr. Sullivan’s pleading guilty. He recalled that the petitioner’s previous counsel advised him of the petitioner’s alibi claim that he was at a Halloween party during one of the drug transactions. Counsel testified that he contacted the petitioner’s wife and his preacher as possible witnesses, but he discovered that the petitioner’s wife would not testify that he attended a Halloween party on the night of the crime and that the preacher would not return his telephone messages. Counsel said that he looked at the petitioner’s records of incarceration and determined that nothing in the records placed him outside Sullivan County on the offense dates.

Counsel testified that he researched whether NHAS operated as a school at the time of the offense and that he determined that it was a school in October 2001. Counsel further stated that he measured the distance from the school to the drug sale. He said, “I didn’t even need to measure it. I knew it wasn’t [more than] 1000 feet. But I did it anyway.” Counsel also testified that he was aware that Ms. Wilson was in a coma and unavailable for trial and that he discussed this with the petitioner “months before” trial. Regarding the district attorney general’s mentioning during his closing argument Ms. Wilson’s identification of the petitioner as present at the drug deal, counsel maintained that he did not object as a tactical decision because he “did not want to draw more

attention” to the district attorney general’s “honest mistake.” Counsel testified that he made a partially unsuccessful motion in limine to exclude audio recordings of Ms. Wilson that incriminated the petitioner. He maintained that he did not object to all of the alleged hearsay because most of the statements did not harm the petitioner and some actually helped his defense that the petitioner was not present at the deal. He said, “[W]hile it may have very well have been hearsay and objectionable, I made a tactical decision not to object because I didn’t see how it hurt my client. And frankly I thought it helped my client.” Counsel testified that he had advised the petitioner of the trial strategy in light of his investigation and that he believed the petitioner was satisfied. He testified that he “did whatever [he] could to try to get [the petitioner] to take” a plea offer.

The post-conviction court credited the testimony of trial counsel over that of the petitioner. The court found that the petitioner “basically attacked at least two or three other lawyers” before trial counsel represented him. The post-conviction court determined that counsel adequately met with and discussed the case with the petitioner. The post-conviction court then denied relief on the ground that trial counsel failed to investigate whether NHAS operated as a school, noting that the petitioner had the burden of showing prejudice and failed to show that the facility at 205 East Sevier Avenue did not operate as a school on the offense dates. The court also noted that the petitioner could not contradict that State’s testimony and trial counsel’s testimony that the crimes occurred well within 1,000 feet of NHAS. It further credited counsel’s testimony that he personally measured the distance.

Regarding the hearsay issues raised by the petitioner, the court found that the hearsay statements largely dealt with the unavailable declarant’s identifying other person’s involvement in the drug transactions, and the court noted that counsel’s not objecting to these statements was a reasonable trial tactic. The court said, “It was just an attorney in the heat of trial listening to proof. And in this case the attorney had done a lot of homework before he even got to trial . . .” The post-conviction court also found that the petitioner failed to show how any investigation of or cooperation with Mr. Sullivan would have helped his case.

The post-conviction court filed a written order denying the petition for post-conviction relief on December 3, 2008. The petitioner filed a timely notice of appeal.

#### *Issues on Appeal*

On appeal, the petitioner only alleges ineffective assistance of counsel, challenging trial counsel’s failure to investigate whether NHAS operated as a school at the time of the offense and whether the offense occurred within 1,000 feet of the property. The petitioner also argues that counsel failed to properly investigate Mr. Sullivan and the conditions of his guilty plea and that he failed to object to the hearsay testimony of Officer Ramsey and the closing argument of the district attorney general regarding statements of Ms. Wilson.

The post-conviction petitioner bears the burden of proving his or her allegations by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). On appeal, the appellate court accords to the post-conviction court’s findings of fact the weight of a jury verdict, and these findings are conclusive on appeal unless the evidence preponderates against them. *Henley v. State*, 960

S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997). By contrast, the post-conviction court's conclusions of law receive no deference or presumption of correctness on appeal. *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must first establish that the services rendered or the advice given were below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Second, he must show that the deficiencies "actually had an adverse effect on the defense." *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067 (1984). The error must be so serious as to render an unreliable result. *Id.* at 687, 104 S. Ct. 2064. It is not necessary, however, that absent the deficiency, the trial would have resulted in an acquittal. *Id.* at 695, 104 S. Ct. at 2068-69. Should the petitioner fail to establish either factor, he is not entitled to relief. Our supreme court described the standard of review as follows:

Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.

*Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996).

On claims of ineffective assistance of counsel, the petitioner is not afforded the benefit of hindsight, may not second-guess a reasonable trial strategy, and cannot criticize a sound, although unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Claims of ineffective assistance of counsel are regarded as mixed questions of law and fact. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). When reviewing the application of law to the post-conviction court's factual findings, our review is de novo, and the post-conviction court's conclusions of law are given no presumption of correctness. *Fields*, 40 S.W.3d at 457-58; *see also State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000).

With regard to NHAS and its proximity to the drug offenses, the petitioner failed to show any prejudice. Without showing that the property did not operate as a school at the time of the offense and without showing that the drug deal occurred beyond 1,000 feet of the school, we cannot say that the petitioner suffered any prejudice as a result of counsel's alleged deficient performance. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Further, we note that the State proved these elements of the offense through the testimony of the Attendance Supervisor for Kingsport City Schools and the GIS Manager for the City of Kingsport. The petitioner failed to meet

his burden at the post-conviction hearing of showing that counsel failed to uncover evidence to rebut these witnesses. We deny relief on these grounds.

Further, the petitioner presented no evidence suggesting that further investigation into Mr. Sullivan's plea agreement would have aided his defense. He failed to show that Mr. Sullivan would have testified in his defense or that Mr. Sullivan's testimony would have altered the outcome of his trial. Without a proper showing of prejudice, we cannot say that any of counsel's alleged shortcomings reached the level at which we grant post-conviction relief.

Lastly, the petitioner has failed to meet his burden in showing that trial counsel's failure to object to hearsay statements mentioned by Officer Ramsey and the district attorney general constituted ineffective assistance of counsel. Counsel explained that his withholding objection was part of a trial strategy, and the post-conviction court accredited this explanation. Further, a review of the record shows that the hearsay statements at issue do not identify the petitioner as the perpetrator of the crime, and we cannot discern how these statements prejudiced the defendant. As to Ms. Ramsey's and the district attorney general's referencing the unavailable declarant's identification of the petitioner as present during the drug deal, the petitioner failed to show how the comment harmed him in light of the entire body of convicting evidence. The post-conviction court noted that two officers and a video recording also identified the petitioner, and it found that any error in failing to object would not amount to prejudice as required by the second prong of *Strickland*. We agree. We will not second-guess trial counsel's strategy, especially in light of the petitioner's failure to show prejudice.

### *Conclusion*

Because the petitioner has failed to establish his claim of ineffective assistance of counsel by clear and convincing evidence, we affirm the post-conviction court's denial of relief.

---

JAMES CURWOOD WITT, JR., JUDGE